85-1324

NO. _____

IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1985

WASHINGTON STATE NURSES
ASSOCIATION
Petitioner,

v.

WASHINGTON STATE HOSPITAL
COMMISSION; J.C. McCARTHY;
NORMAN RAMSEY; JON D. SMILEY;
ARCH LOGAN; and LINDA ZIMMERMAN,
Respondents.

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The district court concluded after a trial that a state hospital cost control agency's practices were pre-empted by federal labor law, based on its finding of fact that the agency had purposely controlled wage negotiations between hospitals and their employees' union. The court of appeals reversed. The questions are:

1. Did the court of appeals err in holding the district court's finding to be clearly erroneous?
2. Did the court of appeals err by terming the finding of fact as a conclusion of law?
3. Did the state agency conflict with collective bargaining rights granted by the National Labor Relations Act when it used its budget review practices and public pronouncements to minimize negotiated wage increases?

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The opinion of the court of appeals is reported at 773 F.2d 1044. The findings and conclusions of the district court were not reported. The opinion, findings, and conclusions appear in the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1985. No rehearing was requested. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULES PROVISIONS

Constitution, Article VI, clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

29 U.S.C. § 157:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Fed. R. Civ. Proc. 52(a) (1985):

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

Petitioner Washington State Nurses Association ("Association") bargains on behalf of several thousand registered nurses with hospitals whose budgets are regulated by Respondent Washington State Hospital Commission ("Commission"). The Commission's function in part is to assure that hospital "costs do not exceed those that are necessary for prudently and reasonably managed hospitals." RCW 70.39.010. The Commission conducts a detailed review of each hospital's proposed expenses and may order that a hospital delete certain expenses which it deems excessive. Commission review culminates in its determination that a hospital may collect a set amount of revenue by charging established rates.

Against a backdrop of hospital industry wage negotiations, the Commission in 1982 formally adopted a "guideline" for review of the salary and wage component of hospital budgets. Wage increases over 5% would not be approved in certain situations. Budgeted increases exceeding 5% would have to be "justified" to the Commission. The Commission adopted a similar guideline in 1983 for use in reviewing 1984 budgets. The Commission excepted negotiated increases in existing labor contracts from the guidelines but made no allowance for increases expected to be negotiated in upcoming collective bargaining.

Believing that the Commission was influencing and attempting to control the outcome of collective bargaining, the Association sued to enjoin Commission interference in the negotiation process. Jurisdiction in the district court was based on 28 U.S.C. §§ 1331, 1337, and 1343. The district court conducted a trial on a stipulated record of the Commission's budget review practices and public pronouncements.

There was evidence that individual Commissioners spoke out publicly on wage negotiations of the Association and other unions. One Commissioner, after noting that major nursing labor contracts were being negotiated, "caution/ed/ hospitals on settling at higher rates which will not necessarily be passed through the budget." Another Commissioner suggested to hospital industry representatives that hospital groups "should, in their negotiations, put emphasis on the position taken by the Commission."

There was evidence that the Commission formally ordered several hospitals to reduce their operating expenses by the amount by which their budgets for wage increases exceeded Commission wage guidelines. Although the Commission did not order hospitals to limit raises for specific employee groups, nurses' wages comprised a large proportion of total wage costs.

There was evidence that other hospitals had to justify proposed nurses' wage adjustments to the Commission after Commission staff had recommended cuts in the wage component of their oper-

ating expenses. In one instance, staff recommended that a $35,000 wage reduction be accomplished by recalculating the salary budget based on an adjustment of 5% for the nurses' labor contract for the remainder of the fiscal year. The Commission restored the wage amounts after the hospital protested that the staff's estimate of wages to be negotiated in the future was unrealistic. In another instance, a hospital and the Association negotiated a wage increase designed to bring nurses' compensation to competitive levels. Commission staff disapproved part of the catch-up amount. The Commission restored the full budgeted amount after hospital and union representatives justified the amount at a public hearing.

There was evidence that hospital negotiators would not discuss Association proposals for certain wage increases because the Commission would not approve wage increases exceeding the guidelines. The Commission guideline provided the ceiling for wage increases in several negotiations.

After considering a large record, the district court made a finding of fact that (Appendix D: 6):

> The Commission has taken the following action which has interfered with and/or influenced the outcome of collective bargaining:
>
> a. The Commission has indirectly, but purposely controlled the amount by which salaries for registered nurses represented by the Association should be increased.
>
> b. By statements at public hearings, the Commission used its position to influence hospitals to negotiate wage settlements with little or no wage increase. Commission members repeatedly told hospital officials that wage increases exceeding 5% would have to be "justified." Commission members on at least two occasions, without dissent or disclaimers, have cautioned hospitals against setting higher than desired wage increases with the Association and have urged hospital

> negotiators to emphasize the Commission's salary and wage policies in upcoming negotiations with the Association.

The court concluded (Appendix D: 7-8):

> The Commission is not acting in a "neutral" fashion as it seeks to adjust the interests of employers, unions, and employees in the collective bargaining arena. Congress has not elsewhere authorized states to influence and affect collective bargaining as the Commission has done here. For these reasons, the Commission's actions are pre-empted by Federal labor law.

Judgment was entered directing the Commission to cease and desist from any involvement in the collective bargaining process. The court also concluded that the Commission's practices similarly conflicted with state labor law governing public hospitals.

The court of appeals reversed. The court without explanation termed the district court's finding as a conclusion, but also held the finding to be clearly erroneous (Appendix A: 3-4). The court's disagreement was based on its understanding that the Commission had formal legal authority to set revenues, not to prevent increases in wages. The court acknowledged that the Commission meant "to encourage hospitals and unions to minimize cost increases" (Appendix A: 2-3), and that its conduct "may have an indirect influence on bargaining" (Appendix A: 14). But there was no conflict with federal labor law as the Commission could not "control" terms of specific labor agreements nor place "sanctions" on unions or hospitals which negotiated objectionable wage settlements.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Disposition Of The District Court's Finding Of Fact Conflicts With Recent Decisions Of This Court On Rule 52 And Requires Exercise Of This Court's Power Of Supervision.

A. The Court Of Appeals Rejected A Finding Of Fact Which Was Based On A Plausible Analysis Of Sophisticated Regulatory Practices, In Contravention Of Rule 52 And *Anderson v. Bessemer City*, ____ U.S. ____, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

Agency regulation may be described in terms of the agency's legal mandate and formal statutory authority. Regulation as actually practiced may be quite different. The district court examined both the form and substance of the Commission's regulation and, after a trial, found as fact that the Commission had indirectly but purposely controlled collective bargaining. As reviewed in the Statement of the Case, there was evidence that the Commission used its budget procedures and its influence to coerce negotiators to settle labor contracts within state guidelines. The court of appeals, focussing instead on the Commission's authority to set rates and determine total revenues, found that the Commission did not control bargaining. The petition presents the question whether the court of appeals impermissibly substituted its analysis of the facts for the district court's plausible account.

Rule 52 is premised in part on the expertise of the trial judge: "(t)he trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." *Anderson v. Bessemer City*, ____ U.S. ____, 84 L. Ed. 2d 518, 529 (1985). In this case the district court had to resolve ambiguities necessarily present in evaluating sophisticated regulatory practices. Implicit in the district court's finding of fact was its belief that the Commission's method of regulation intruded beyond the outlines of its statutory charter. The rule is that an appellate court cannot

substitute its own view of the facts because it resolves ambiguities differently or gives facts another construction. *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 857-858 (1982). Particularly in light of *Anderson*, and the recent amendment to Rule 52, the finding is entitled to deference even though based on a stipulated record. *See also, Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960) (Rule 52 "applies also to factual inferences from undisputed basic facts").

While the public significance of the finding of fact may have increased the appellate temptation to substitute judgment, Rule 52 makes no exception for the type of case under appellate review. This Court in recent years has stepped up its supervision of appellate review of fact findings. *Anderson, supra; Inwood Laboratories, supra; Pullman-Standard v. Swint*, 456 U.S. 273 (1982). The court of appeals' rejection of the finding because of its focus on the form rather than substance of the Commission regulation makes Court supervision necessary again.

B. The Court of Appeals' Unexplained Terming Of The Finding Of Fact As A Conclusion Conflicts With *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), As 'Ultimate Facts' Are Within The Scope Of Rule 52.

The court of appeals, without discussion or citation, termed the district court's critical finding as a conclusion of law (Appendix A:3). The court of appeals' decision on that point was consistent with its view, treated above, that the facts should have been analyzed from the aspect of the Commission's formal authority. However, the gist of the district court's finding was that the Commision's method and practice of regulation, apart from the description of its formal authority, controlled collective bargaining. The district court found as fact what the regulators did. It is a separate matter as to what the law and regulations meant in the abstract. The former is a factual inquiry. The 'ultimate' fact that the Commis-

sion controlled bargaining is within the purview of Rule 52. *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

II. Washington State's Control Of The Outcome Of Collective Bargaining, In Order To Govern Prices Charged By Regulated Private Industry, Presents An Important Public Question Of The Supremacy Of The Federal Right To Bargain Collectively Over Conflicting State Economic Regulation.

A. The Court Should Decide The Significant Public Issue Of Whether A State's Interest In Controlling Hospital Costs Permits It To Purposely Control Or Influence Collective Bargaining.

The National Labor Relations Act grants employees the right to bargain collectively with employers. 29 U.S.C. §157. The Act was designed to regulate the procedure of collective bargaining but leave the parties free to determine its substance. S. Rep. No. 573, 74th Cong. 1st Sess., 12 (1935); *compare, H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 107-108 (1970) (describing "private bargaining under governmental supervision of the procedure alone" as "the fundamental premise on which the Act is based"). This doctrine underlies three labor pre-emption cases of this Court. In *Local 24, Teamsters v. Oliver*, 358 U.S. 283, 295-297 (1959), this Court held that a state could not apply its antitrust law to invalidate a term of a labor contract. Nor may the state or federal governments regulate labor's economic weapons left open to them under federal law, as such regulation would impermissibly influence the substantive terms of labor contracts. *NLRB v. Insurance Agents*, 361 U.S. 477, 490 (1960) (NLRB); *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 149, 153 (1976) (state labor agency).

The Court has never decided whether labor pre-emption principles similarly prohibit the efforts of states to influence or control

the outcome of bargaining in the name of price control. This Court has struck down state efforts to outlaw or control strikes against public utilities, holding that public utilities have no unique status under the Act separate from other employers. *Amalgamated Association of Street Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383 (1951); *Division 1287, Amalgamated Association v. Missouri*, 374 U.S. 74 (1963). *Oliver* decided that a state could not prevent implementation of a contract term concerning a mandatory subject of bargaining. The rationale of *Oliver* was understood by this Court in *Machinists v. WERC*, 427 U.S. 132, 153 (1976) to also prevent "state attempts to *influence* the substantive terms of collective-bargaining agreements" (emphasis added). No decision has addressed whether the principles animating *Oliver, Machinists*, and *Insurance Agents* foreclose states from regulating industry costs by coercing labor and management to reach 'reasonable' settlements.

The national health care cost containment problem has brought this conflict between state regulation and federally protected rights to the forefront. At least seven states in addition to Washington have adopted hospital rate-setting legislation with varying degrees of regulation over hospital budgets.[1] One state even allows a state officer to determine whether additional negotiated labor costs are reasonable and should be added to the rate base. McKinney's Consolidated Laws of New York, Public Health Law §2807-a(5)(c). Whether the Washington Commission controlled labor negotiations or, in the words of the court of appeals, merely "encourage/d/ hospitals and unions to minimize cost increases" (Appendix, A: 3), the state uses its powers to influence negotiators to the state's view of a reasonable settlement.

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[1] Connecticut: C.G.S.A. §19a-145 *et seq.*; Maryland: Anno. Code Md. HG §19-201 *et seq.*; Massachusetts: GL c. 6A §§31 *et seq.*; New Jersey: N.J.S.A. 26: 2H-4.1; New York: McKinney's Consol. Laws N.Y. Public Health Law §§ 2807, 2807-a; West Virginia: West. Va. Code §16-29B; Wisconsin: W.S.A. §54.01 *et seq.*.

The Commission's actions, and the decision below, are critical to the future scope of collective bargaining with regulated industires. When the State coerces the parties to agree to the outcome it desires on employee wages – the most contentious mandatory subject of bargaining – free collective bargaining is circumscribed. State action also discourages such inventive bargaining solutions as trading higher pay for other contract concessions, or negotiating comparable worth adjustments without governmental compulsion.

The Court stated its rationale in *Local 24, Teamsters v. Oliver*, 358 U.S. 283, 296 (1959), as follows:

> We believe that there is no room in this /federal statutory/ scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State. (citations omitted)

The court should decide whether the same pre-emption principle prohibits the Commission from limiting the substance of the Association's collective bargaining.

This Court reviews two cases this Term where states enforced their concept of proper labor conduct against employers through state franchise and purchasing powers. *Golden State Transit Corp. v. City of Los Angeles*, 754 F.2d 830 (9th Cir. 1985), *cert. granted* ____ U.S. ____, 87 L. Ed. 2d 611 (June 17, 1985) (No. 84-1644); *Wisconsin Department of Industry v. Gould, Inc.*, 750 F.2d 608 (7th Cir. 1984), *probable juris. noted* ____ U.S. ____, 86 L. Ed. 2d 257 (May 20, 1985) (No. 84-1484). Resolution of either case may illuminate the issues at stake here. Petitioner Association, before any opinion was issued, requested the court of appeals to stay further proceedings pending decision of *Golden*

State and *Gould* (Appendix B). The court of appeals declined (Appendix C). While Petitioner believes this case worthy of full consideration, the Court could grant the writ and issue an appropriate order after the two cases are decided.

B. The Court Should Resolve The Conflict In Principle Between The Circuits On Whether A State, Even Lacking Power To Dictate Terms Of Labor Agreements, May Coerce Settlements.

The courts below disagree on whether the Commission controlled bargaining. Even under the court of appeals' conception, the Commission's budget review practices and public pronouncements "undoubtedly /were/ intended to encourage hospitals and unions to minimize cost increases" (Appendix A: 3). Nevertheless, the court of appeals found no interference "in any impermissible way" with the exercise of collective bargaining rights. *ibid.* Hence, the state in the view of the court of appeals could use its machinery and its position as controller of the hospital purse strings to influence labor negotiators.

Two other courts of appeals have held that state mediation agencies were pre-empted by the National Labor Relations Act from investigating and publicly issuing non-binding recommendations concerning labor disputes. *General Electric Company v. Callahan*, 294 F.2d 60 (1st Cir. 1961), *cert. dismissed* 369 U.S. 832; *Oil, Chemical & Atomic Workers Local 5-283 v. Arkansas Louisiana Gas Company*, 332 F.2d 64 (10th Cir. 1964). Both decisions were premised on the principle that the Act was meant to encourage collective bargaining, not to coerce agreement. *Callahan*, 294 F.2d at 67; *OCAW*, 332 F.2d at 66. The court of appeals below acknowledged the Commission's intent to encourage low wage settlements but reached the opposite conclusion from the First and Tenth Circuits. The distinction between a state mediation agency and a hospital cost control agency is immaterial, as both agencies sought to "accommodate ... the special interests of

employers, unions, or the public in areas such as ... collective bargaining." *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 156n. (1976) (Powell, J., concurring). There is a square conflict between the circuits which should be resolved.

CONCLUSION

The Court should grant certiorari to review the decision of the court of appeals.

Respectfully submitted,

Richard H. Robblee
Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES COURT
OF APPEALS FOR THE
NINTH CIRCUIT

WASHINGTON STATE NURSES
ASSOCIATION,

Plaintiff-Appellee,

v.

WASHINGTON STATE HOSPITAL
COMMISSION, ET AL.,

Defendants-Appellants.

No. 84-4113/4131
D.C. # CV-83-533-T

OPINION

Appeal from the United States District
Court for the Western District of
Washington
Honorable Jack E. Tanner, District
Judge, Presiding
Argued and submitted May 9, 1985,
In Seattle, Washington

SCHROEDER, Circuit Judge

This litigation illustrates the continuing tension between the interest of labor in improving wages and the interest of state governments in containing rising hospital rates. The State of Washington

has granted the Washington State Hospital Commission the power to determine the maximum rates which each hospital in the state can charge patients. The Washington State Nurses Association, a labor organization representing nurses, filed this action against the Commission for an injunction against certain Commission practices which the Association claimed interfered with its state and federally protected rights to bargain for wage increases.

The district court granted an injunction against the Commission's "involvement" in collective bargaining. The injunction was based on a stipulated record reflecting certain budget review practices of the Commission and certain public pronouncements of its members. We reverse. We conclude that the budget review practices and public pronouncements, while undoubtedly intended to

encourage hospitals and unions to minimize cost increases, could not control the terms of any particular collective bargaining agreement, and did not interfere in any impermissible way with the exercise of collective bargaining rights protected by section 7 of the National Labor Relations Act, 29 U.S.C. § 157. No conflict occurs with federal law which would justify a holding that the state's activities are preempted by federal law within the standards we apply. See Brown v. Hotel and Restaurant Employees, ____ U.S. ____, 104 S. Ct. 3179, 82 L.Ed. 2d 373 (1984); Hill v. Florida, 325 U.S. 538, 65 S. Ct. 1373, 89 L. Ed. 1782 (1945); Golden State Transit v. City of Los Angeles, 686 F.2d 758 (9th Cir. 1982), cert. denied, 459 U.S. 1105 (1983); Massachusetts Nurses Association v. Dukakis, 726 F.2d 41 (1st Cir. 1984).

The district court concluded that

"[t]he Commission has indirectly, but purposely controlled the amount by which salaries for registered nurses represented by the Association could be increased." Although the court's findings did not identify specific practices to which it was referring, the underlying facts are not materially in dispute.[1/] The record reflects that the principal objectionable practice is the Commission's use of "guidelines" to measure the reasonableness of wage increases as a component of the overall costs which the Commission permits to be reflected in rates. Pursuant to the authority given the Commission to review a hospital's financial status, the Commission requires hospitals to submit their proposed budgets for review. The Commission then breaks down the information submitted into various categories; one such category is total salary and wages. Under the guidelines, a comparison is made

where the overall wage increases amount to more than five percent over the preceding year. In that event, the hospital's overall costs are compared to increases of hospitals of comparable size in the same geographic area, and if the increase in question exceeds that rate, the Commission requires a justification for the increase. It appears that on several occasions the Commission did not find the justification satisfactory and refused to recognize projected wage increases as part of the hospital's total projected costs to be offset by increased rate revenue.

In assessing the degree to which these practices actually affect collective bargaining negotiations, we believe it is significant that the guidelines measure total salaries and wages as one cost category, without regard to collective bargaining units or even classifications of employees. Neither nurses nor unions

receive any special consideration. It is equally significant that even when a wage increase is "disapproved," the Commission cannot prevent the hospital from increasing wages. The Commission's only control is over the revenue which the hospital can receive from rates. So far as the Commission is concerned, the hospitals are free to contract to pay wages at any level so long as they are able to meet their obligations, either by obtaining revenue from sources other than rates, or by reducing costs in other areas.

The Commission's budget guideline practices with respect to wages are mirrored in the public statements made by Commission members, which the district court also found objectionable. For example, the Commission's Chairman stated: "During the current period of economic recession and high unemployment the Commission must promote budget con-

straints, cost awareness, prudent buying practices, conservationism [sic] in granting salary and wage adjustment and postponement or scaling down of capital expenditures."

The court's findings in relevant part were that:

> By statements at public hearings, the Commission used its position to influence hospitals to negotiate wage settlements with little or no wage increase. Commission members repeatedly told hospital officials that wage increases exceeding 5% would have to be "justified." Commission members on at least two occasions, without dissent or disclaimers, have cautioned hospitals against setting higher than desired wage increases with the Association and have urged hospital negotiators to emphasize the Commission's salary and wage policies in upcoming negotiations with the Association.

In assessing the affect [sic] of these oral statements on bargaining, as in evaluating the Commission's practices with respect to the guidelines, it is significant that the Commission's legal authority

is limited to setting rates. It can neither actually limit overall costs nor impose wage ceilings. Given the fact that wages comprise sixty percent of hospitals' costs, any statements by public officials charged with responsibility for trying to reduce costs inevitably would have to encompass wages. It does not appear, however, that the Commission regularly singled out particular collective bargaining negotiations for comment. The statements that were made cannot be viewed as any more controlling over the bargaining process than the guideline practices.

The issue we must decide is whether the Commission's practices and statements on wage increases acted as a restraint on the exercise of collective bargaining rights protected by federal law. The two leading circuit court decisions dealing with state efforts to deal with rising costs and rates in certain industries are

Massachusetts Nurses Association v. Dukakis, 726 F.2d 41 (1st Cir. 1984), and Amalgamated Transit Union, Division 819 v. Byrne, 568 F.2d 1025 (3d Cir. 1977) (en banc). In Dukakis, the First Circuit held that a state statute aimed at restraining increases in hospital costs did not impermissibly interfere with collective bargaining rights of the nurses union. The court concluded, in a careful opinion, that federal labor policy does not preempt a state statute which regulates hospital costs by imposing an overall limit on what hospitals can collect for patient care.

The aim of the Washington statute is similar to that of the Massachusetts law considered in Dukakis. It authorizes the Commission to set the "types and classes of charges" for hospitals and to review hospitals' financial records in order to establish the maximum rates each hospital can charge patients. See Wash. Rev. Code

§§ 70.39.150, 70.39.160. We agree with the First Circuit in Dukakis, that a statute authorizing the control of rates which "is oriented toward neither labor-management issues in general nor wages in particular," 726 F.2d at 44, does not impermissibly interfere with collective bargaining.

The plaintiff in this case does not claim that the state statute itself conflicts with federal labor policy. It argues that the budget review practices and public statements of the Commission constitute such an interference with bargaining that they conflict with federal labor law. The most instructive and influential opinions on related, but, as we shall see, more difficult issues, are those of the Third Circuit, sitting en banc, in Byrne. There, the governor of New Jersey threatened to take away state subsidies of private transportation

companies in the event that the employers and the unions agreed to a proposed uncapped cost of living adjustment clause in pending negotiations. 568 F.2d at 1026-27. A majority of the Third Circuit held that even such a direct threat did not impermissibly interfere with the collective bargaining process. The minority, in strong dissents, would have held that the threat was an impermissible interference in the negotiations. Judge Aldisert's dissent made a distinction, which the court in Dukakis quoted with at least some approval, and which describes a key distinction between this case and Byrne. That is the distinction between a threat of withdrawing a subsidy and a communication to all negotiating parties of the overall level of financing which the state will permit:

> [T]here exists a critical difference between a state communicating to all affected parties the extent of

> finances it intends to grant for carriers' operations and a state communicating that it will not continue its subsidization if the carriers agree with the unions to retain uncapped cost of living clauses in their employment contracts. The former communication presumably does not constitute interference with negotiations over wages and working conditions, as it is not a state attempt "to influence the substantive terms of collective bargaining agreements."

Byrne, 568 F.2d at 1035 (Aldisert, J., dissenting); quoted in Dukakis, 726 F.2d at 44.

We conclude that the practices and statements upon which the district court's injunction was based fall short of the kind of control over collective bargaining which might impermissibly interfere with the exercise of rights under section 7. Under the standards that have developed in this area, it is clear that state efforts to cap cost increases by limiting the hospitals' revenue is a proper province of state regulation. Dukakis, 726 F.2d 41;

Byrne, 568 F.2d 1025. The Washington State Hospital Commission's wage guidelines give the hospitals no less flexibility in managing their overall costs than they would have if the Commission simply imposed a percentage cap on rate increases. Indeed, given the possibility for overriding the guidelines by justifying increases which exceed them, the hospitals may have even greater flexibility under the present system than they would have in the event of a revenue cap.

The efforts of the Commission, both in its use of guidelines and in its urgings to reduce hospital costs, do not impose sanctions on either the union or the employer with respect to collective bargaining negotiations. Cf. Brown, ____ U.S. ____, 104 S. Ct. at 3192, 82 L.Ed.2d at 392 (White, J., dissenting); Hill v. Florida, 325 U.S. 538, 65 S. Ct. 1373, 89 L.Ed. 1782 (1945). This case is far

removed from Local 24, International Brotherhood of Teamsters v. Oliver, 358 U.S. 283, 79 S. Ct. 297, 3 L.Ed.2d 312 (1959), where a state enacted an antitrust law that struck down a provision governing pay for truck owners who drove their own rigs. The Court held that such invalidation of a specific term had an impermissible impact upon the actual terms of bargaining, an area expressly left unregulated by Congress. Id. at 296, 79 S. Ct. at 305, 3 L.Ed.2d at 322. Here, the Commission has not invalidated an actual negotiated scale, but has simply set guidelines for total wage costs. Wage increases greater than the guidelines are not unlawful.

The conduct of the Commission may have an indirect influence on bargaining. We observed in Golden State Transit Corp. v. City of Los Angeles, 754 F.2d 830, cert. granted, 105 S. Ct. 3475 (1985),

that "[i]n any regulated industry, a myriad of governmental decisions from rate-setting to establishment of safety standards are bound to affect labor relations in that industry." Id. at 833. The government actions in this case had far less actual effect on any particular negotiations than the government decision in that case to withhold a franchise to do business until a specific labor dispute was resolved. The record before us shows that the Commission's policies and statements were aimed principally at encouraging the reduction of overall wages a well as other costs. We hold that they did not prevent or significantly inhibit the exercise of collective bargaining rights protected by the NLRA.

For similar reasons, we must reject the argument that there was a conflict between the Commission's conduct and State laws guaranteeing collective bargaining

rights similar to those guaranteed by federal law. See Allen v. Seattle Police Officers Guild, 100 Wash. 2d 361, 670 P.2d 246, 252 (1983).

The judgment of the district court is REVERSED.

FOOTNOTE

1/ To the extent that the district court's characterization of the Commission's conduct as purposeful control over collective bargaining negotiations may be deemed a finding of fact, it is not supported by the stipulated record and is clearly erroneous. See Anderson v. City of Bessemer City, 105 S. Ct. 1504 (1985).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON STATE NURSES
ASSOCIATION,

Plaintiff/Appellee/
Cross-Appellant,

v.

WASHINGTON STATE HOSPITAL
COMMISSION, et al.,

Defendants/Appellants/
Cross-Appellees.

NOS. 84-4113
84-4131

DC NO. CV-83-533-JET

MOTION TO STAY PROCEEDINGS

Appellee Washington State Nurses Association moves the Court to stay further proceedings and issuance of decision in this case pending decision by the Supreme Court of the United States in two cases in which certiorari recently was granted, or probable jurisdiction noted, Golden State Transit Corp. v. City of Los Angeles, 754 F.2d 830 (9th Cir. 1985)

cert. granted ____ U.S. ____, 87 L Ed 2d 611 (June 17, 1985); Gould, Inc. v. Wisconsin Department of Industry, Labor and Human Relations, 750 F.2d 608 (7th Cir. 1984), probable jurisdiction noted ____ U.S. ____, 86 L Ed 2d 257 (May 20, 1985). The decision in Golden State was reported in the August 23, 1985 advance edition.

The first Golden State appeal was argued in the parties' briefs, and the second Golden State appeal was cited to this panel by the Association after briefing had been concluded. While the Association believes that the case is factually distinguishable, it is likely that the Supreme Court decision will shed light on the applicability of the labor pre-emption doctrine to state intervention in the collective bargaining process. That is the same issue which is central to the instant case. The Gould case concerns

a state law which disbars "labor law violators" from obtaining state contracts. Again, it is likely that the Supreme Court will address the pre-emption issue and clarify the law in the area. The Golden State case is particularly significant as it involves the so-called "second line of pre-emption analysis" at stake in the instant case. That analysis focuses "upon the crucial inquiry whether Congress intended that the conduct involved be unregulated because 'left to be controlled by the free play of economic forces.'" Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132, 140 (1978). There have been only a handful of Supreme Court cases to address this issue in the last thirty years. Golden State undoubtedly will add to the law and assist the Court in resolving this case.

It would serve the interests of judicial economy to stay this appeal

pending decision in Golden State and Gould. If this Court issues its decision before the Golden State and Gould decisions are handed down, it is likely that this Court will reconsider in light of the new opinions. If the proceedings are stayed, the parties will have the opportunity to brief the issues in the light of the new opinions and the Court will be fully advised before deciding the case.

DATED this 2nd day of October, 1985.

Richard H. Robblee
Hafer, Price, Rinehart
& Schwerin
Attorneys for Appellee
Washington State
Nurses Association

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON STATE NURSES
ASSOCIATION,

Plaintiff-Appellee/
Cross-Appellant,

vs.

WASHINGTON STATE HOSPITAL
COMMISSION, et al.,

Defendants-Appellants/
Cross-Appellees.

Nos. 84-4113
84-4131

ORDER

Before: GOODWIN, SCHROEDER, and
BEEZER, Circuit Judges

The motion to stay proceedings in these appeals is denied.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA

WASHINGTON STATE NURSES ASSOCIATION,

Plaintiff,

-vs-

WASHINGTON STATE HOSPITAL COMMISSION, et al.,

Defendant.

NO. C83-533T

FINDINGS OF FACT AND CONCLUSIONS OF LAW

---

1. Plaintiff, Washington State Nurses Association ("Association") is an unincorporated professional organization with its principal office in Seattle, Washington.

2. Defendant, Washington State Hospital Commission ("Commission"), is an agency of the State of Washington with duties and powers as set forth in Wash.Rev.Code 70.39. Four of the five

individuals, J.C. McCarthy, Norman Ramsey, Jon D. Smiley, and Arch Logan, Jr., M.D., are members of the Commission. The fifth named Defendant, Beverly Freeman, was a member of the Commission, but resigned in 1983. Linda Zimmerman, who was appointed by the governor to fill the vacancy created by Ms. Freeman's resignation, was added as a party defendant, and Beverly Freeman was stricken as a party defendant.

3. The Association is the exclusive collective bargaining representative, within the meaning of Title 29 U.S.C. § 159, and Wash.Rev.Code 41.56.080, for several thousand registered nurses employed by hospitals regulated by the Commission. The Nurses Association negotiates with such hospitals for collective bargaining agreements which govern the wages, employment benefits, and other conditions of employment of registered nurses.

4. Pursuant to Chapter 70.39 Wash.Rev.Code, the Commission is charged with the duty to approve rates for all hospitals in the State of Washington. Hospitals may charge only those rates approved by the Commission.

On an annual basis, each hospital is required to submit to the Commission its budget and rate request for the following year. The Commission staff reviews the various components of the request to ensure that total hospital costs are reasonably related to total services, that hospital rates are reasonably related to aggregate costs, and that rates are set equitably among all purchasers of services without undue discrimination.

Review of a budget rate request necessarily involves examination of the several components of a proposed budget, including capital accounts and operating expenses. Operating expenses are a

significant component of any budget and all wages, salaries, and employee benefits, including those of nurses, comprise 55-60% of operating expenses. Commission staff, therefore, monitors all the various components of operating expenses, including wages and salaries. The Commission does not segregate wages and salaries which are the result of collective bargaining and those which are individually negotiated.

5. Before 1982, the Commission had informal guidelines, for use by itself and its staff, for the evaluation of increases in hospital budgets. In November of 1982, the Commission adopted a guideline directed solely toward salary and wage increases for use in review of fiscal year 1983 budgets. The guideline adopted in 1982 provided that salary and wage increases in excess of 5% would not be approved in certain situations. In such

cases, staff was directed to allow budgeted salaries and wages contained in labor agreements until they expired, and then for the balance of the fiscal year allow a 5% increase or [sic] base salaries and wages plus incidental increases due to longevity and shift differentials.

6. The Commission adopted a guideline for 1984 fiscal year budgets in November of 1983. Unlike the earlier guideline, this guideline applied to other expenses in addition to salaries and wages. The content of the 1984 fiscal year guideline was the same as the 1983 fiscal year guideline for salaries and wages, except that the 1984 guideline was triggered by a lower budgeted percentage increase (5% and 6.3%) than the 1983 guideline (5% and 7%).

7. Salaries for all hospital employees comprise 55% and 60% of all

operating expenses for the typical hospital. Of total salaries, 50% is attributable to nurses. Typically, more than half of a hospital's nurses are registered nurses.

8. The Commission has taken the following action which has interfered with and/or influenced the outcome of collective bargaining:

a. The Commission has indirectly, but purposely controlled the amount by which salaries for registered nurses represented by the Association should be increased.

b. By statements at public hearings, the Commission used its position to influence hospitals to negotiate wage settlements with little or no wage increase. Commission members repeatedly told hospital officials that wage increases exceeding 5% would have to be "justified." Commission members on at least two occasions, without dissent or disclaimers, have cautioned hospitals against setting higher than desired wage increases with the Association and have urged hospital negotiators to emphasize the Commission's salary and

wage policies in upcoming negotiations with the Association.

From the foregoing Findings of Fact, the Court now makes the following Conclusions of Law.

CONCLUSIONS OF LAW

1. Insofar as any Finding of Fact herein is more appropriately denominated a Conclusion of Law, it is hereby adopted as such.

2. This Court has personal jurisdiction over the parties. Subject matter jurisdiction is conferred by Title 28 U.S.C. §§ 1331, 1337 and 1343, and by the doctrine of pendent jurisdiction.

3. The practices of the Commission, as set forth in the Findings of Fact, and as they pertain to non-public hospitals whose labor relations are governed by the National Labor Relations Act, Title 29 U.S.C. § 141, et seq., conflict with that Act and are illegal. Employees have the

right to bargain collectively. Title 29 U.S.C. § 157. The Commission is not acting in a "neutral" fashion as it seeks to adjust the interests of employers, unions, and employees in the collective bargaining arena. Congress has not elsewhere authorized states to influence and affect collective bargaining as the Commission has done here. For these reasons, the Commission's actions are pre-empted by Federal labor law.

4. The practices of the Commission, as set forth in the Findings of Fact, and as they pertain to public hospitals whose labor relations are governed by Wash.Rev.Code 41.56, are in conflict with that Code and are illegal. Wash.Rev.Code 41.56 was patterned after the National Labor Relations Act and similarly grants public employers and unions the right and duty to bargain, with no limit on the outcome of such bargaining. The legisla-

ture, in enacting Wash.Rev.Code 70.39, did not authorize the Commission to influence and limit collective bargaining as the Commission has done here.

Accordingly, it is hereby

ORDERED that Defendants shall forthwith cease and desist from any involvement in the collective bargaining process between the Washington State Nurses Association and those hospitals which are regulated by Defendants.

The clerk of the court is instructed to send uncertified copies of this Order to all counsel of record.

DATED at Tacoma, Washington, this 27th day of JULY, 1984.

/s/ Jack E. Tanner
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON

WASHINGTON STATE NURSES ASSOCIATION

vs.

WASHINGTON STATE HOSPITAL
COMMISSION, et al

CIVIL ACTION DOCKET NO. C83-533T
JUDGMENT

This action came on for trial before the court, United States District Judge JACK E. TANNER presiding. The issues having been duly tried and a decision having been duly rendered, it is ordered and adjudged .....

Defendant shall forthwith Cease & desist from any invlolvement [sic] in the collective bargaining process between the Washington State Nurses Association and those hospitals which are regulated by Defendants.

DATED AT: Tacoma, Washington

Date: July 27, 1984

Supreme Court, U.S.
FILED
MAR 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-1324

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1985

WASHINGTON STATE NURSES ASSOCIATION,

Petitioner,

v.

WASHINGTON STATE HOSPITAL COMMISSION; J.C. MCCARTHY; NORMAN RAMSEY; JON D. SMILEY; ARCH LOGAN; and LINDA ZIMMERMAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under § 7 of the National Labor Relations Act, 29 U.S.C. § 157, which confers upon employees the right to bargain collectively over wages, is a state agency which establishes the rates which hospitals, including those subject to the Act, may charge their patients, required:

(1) To pass through automatically into the rate schedule any and all wage increases, including increases which the agency determines to be unreasonable; and

(2) To refrain from discussing, at public meetings of that agency, the reasons for and the effects of the agency's refusal to allow such an automatic pass through?

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Court Rules:

FRCP 52 8

STATUTES INVOLVED

In addition to the provision contained on page 2 and 3 of the Petition, the following statutory provisions are also involved in this case, and are reproduced in the Appendix to this Brief:

Wash. Rev. Code § 70.39.010;
Wash. Rev. Code § 70.39.030;
Wash. Rev. Code § 70.39.100;
Wash. Rev. Code § 70.39.110;
Wash. Rev. Code § 70.39.140;
Wash. Rev. Code § 70.39.150;
Wash. Rev. Code § 70.39.160;
Wash. Rev. Code § 70.39.200.

No. 85-1324

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1985

WASHINGTON STATE NURSES ASSOCIATION,

Petitioner,

v.

WASHINGTON STATE HOSPITAL COMMISSION; J.C. MCCARTHY; NORMAN RAMSEY; JON D. SMILEY; ARCH LOGAN; and LINDA ZIMMERMAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Since as early as 1969, the legislature of the State of Washington has been attempting to stem the rapid increase in hospital charges. (Excerpt of Record, hereinafter "Exc.," Vol. II., pp. 1, 2; Click affid.). The culmination of that effort was the creation of the Washington State Hospital Commission (hereinafter "Commission") in 1973.

A. The Statutory Purpose and Function of the Commission.

In creating the Commission, the legislature stated its intent as follows:

> "The primary purpose of this chapter is to promote the economic delivery of high quality and effective hospital health care services to the people by establishing a hospital commission with authority over financial disclosure and budget and prospective rate review and other related matters, which will assure all purchasers of hospital health care services that total hospital costs are reasonably related to total services, that hospital rates are reasonably related to aggregate costs, and that such rates are set equitably among all purchasers of these services without undue discrimination."
>
> Wash. Rev. Code § 70.39.010.[1]

At the time this lawsuit was filed, the Commission was composed of five members appointed by the governor, who were to be "* * * generally representative of the public as consumers, labor, business, and hospitals." Wash. Rev. Code § 70.39.030. The Commission has two related functions, viz. (1) establishing and supervising a system of financial disclosure by hospitals, and (2) developing and operating a system for establishing the rates which those hospitals may charge their patients.

Financial Disclosure

All hospitals are required to utilize the uniform system of accounting and financial reporting, as promulgated by the Commission, to record their revenues, expenses, other income, other outlays, assets and liabilities, and units of service. Wash. Rev. Code § 70.39.100. Each hospital must annually file with the Commission a balance sheet, statement of income and expenses, and other reports of the costs incurred in rendering services as prescribed by the Commission. Wash. Rev. Code § 70.39.110. Additionally, the Commission is to "* * * compile all relevant financial and accounting data in order to have available the statistical information necessary to properly conduct rate review and approval." Wash. Rev. Code § 70.39.150(1).

Rate Review and Approval

The Commission is required to review projected an-

---

[1]This and all other references to the sections of chapter 70.39 Wash. Rev. Code are to those in effect in 1983, the year this action was filed.

nual revenues and to approve the reasonableness of rates proposed to generate that revenue.

No hospital may charge for services at rates other than those established by the Commission. Wash. Rev. Code § 70.39.140. All hospitals must file a schedule of rates, and the Commission is authorized to require amendments or modifications to that schedule where appropriate. Wash. Rev. Code § 70.39.150(1).

B. The System in Practice In General

After a hearing on a hospital's proposed budget, the Commission issues a decision and order setting the maximum total revenue a hospital may generate and the aggregate rate the hospital may utilize to generate that revenue. The hospital must then submit, for Commission approval, a schedule of the rates to be charged by each department for each type of service. This approval of the specific rate schedule is the end product of the Commission's entire review and approval process. (Exc., Vol. II., pp. 25, 26, 30, 31; Bensen dep.).

Contrary to the petitioner's assertion that the Commission "may order that a hospital delete certain expenses which it deems excessive" (Petition, p. 2), the Commission does not, and indeed statutorily cannot, determine the types or amounts of any reductions in expenditures which may be required by a reduction in allowable rates. (Exc., Vol. II., pp. 35-37; McCarthy dep.). Nor does the Commission direct the method by which a hospital may actually spend its approved revenue. (Exc. Vol. II., pp. 96-98; Bensen dep.). All those decisions are left entirely to hospital management. At year's end, the Commission reviews a hospital's operations only to ascertain whether a hospital has conformed to the Commission's order regarding total revenues and rates. (Exc., Vol. II., pp. 30-32; Bensen dep.; Exc., Vol. II., pp. 33, 34; Balestra dep.).

Evolution of the Guidelines

At the cessation of regulation of hospital costs by the

federal Cost of Living Council in April 1974, the Commission began a process leading to the full exercise of its statutory powers. (Exc., Vol. II., p. 3; Click affid.). Beginning October 1, 1975, all hospitals in the state were required to submit proposed budgets to the Commission for review. (Exc., Vol. II., pp. 3, 4; Click affid.). Budgets and other required reports were submitted by the hospitals in accordance with the uniform accounting and reporting system. (Exc., Vol. II., p. 3; Click affid.). The Commission in turn analyzed and categorized this financial information for the purpose of comparison with other hospitals. Hospitals were grouped with hospitals of similar size and characteristics ("peer groups") and according to geographic area ("regional screens"). The Commission then used this comparison of hospitals to identify areas of excessive cost increases. (Exc., Vol. II, pp. 5, 16; Bensen dep.).

In addition, the Commission adopted criteria for reviewing specific components of proposed budgets. In response to President Carter's request in 1978 for voluntary restraints in hospital costs, the Commission for the first time adopted a set of criteria for identifying excessive increases in specific components of proposed budgets. (Exc., Vol. II., pp. 19-22; Lobe memo.). The Commission referred to those criteria as "guidelines."

In 1982 the chairman of the Commission recognized that hospital costs were still rising much faster than the general rate of inflation. In recognition of the close relationship between rising rates and rising costs, he suggested that the Commission adopt rate-setting policies that would promote budget constraints and cost awareness. (Exc., Vol. II., p. 55; McCarthy memo, Oct. 5, 1982).

It was in this context that guidelines specifically focusing on wages and salaries were adopted. It is these guidelines that are here under challenge. Contrary to petitioner's suggestion that these guidelines were adopted "[a]gainst a backdrop of hospital industry wage negotiations * * *" (Petition, p. 3), the guidelines were instead a response to the phenomenon of rapidly escalating hospital rates and costs when the general rate of inflation was significantly falling.

The Commission derived the challenged guidelines from several sources, none of which reflected any bias toward labor or management. The Commission and staff relied on the Consumer Price Index (CPI), the "hospital market basket" published by the federal Health Care Financing Administration, a publication entitled "Rate Controls," and general news of increases granted in similar jobs. (Exc., Vol. II., pp. 76-79; Click dep.; Exc., Vol. II., pp. 80, 81; McCarthy dep.; Exc., Vol. II., p. 82; Bensen dep.).

Neither labor nor management played any role in the development of the challenged guidelines. Rather, they were purely the product of Commission action. The consumer representative, Chairman McCarthy, actually began the process in May 1982. Outside groups were not consulted. In fact, no effort was made to advise either unions or hospitals of their development. (Exc., Vol. II., pp. 38, 39; Click dep.). Hospitals were not required to provide any additional information. (Exc., Vol. II., pp. 40, 41; Click dep.). Hospitals and unions did not even learn of the guidelines until after they were developed, and, even then, there was no special announcement outside the Commission staff. (Exc., Vol. II., pp. 42, 43; Click dep.).

Prior to the adoption of the challenged guidelines, the practice of the Commission had been to treat wage contract increases as a "pass through" by automatically allowing them to be reflected in the hospital's rate structure. In 1982 the Commissioners realized that this policy needed to be changed. The Commission would no longer "rubber stamp" wage increases and pass on unreasonable increases to rate payers. (CR 42, Ex. 12, p. 13; McCarthy dep.).

The challenged guidelines thus represented an important change in Commission practice; hence the discussion of them by Commissioners and others at public meetings. The gist of the statements by Commissioners was that, as regulators of hospital rates, they would not feel bound to build into those rates wage increases that were unreasonable. (CR 42, Ex. 12, p. 13; McCarthy dep.). Wage increases would now be reviewed in light of inflation and other factors. Increases in excess of the guidelines would be passed through if the hospital were a relatively low cost hospital

as measured by other criteria, such as the "screens," or if the increases were otherwise justified. (CR 42, Ex. 12, p. 3, and Ex. 4; McCarthy dep.). For instance, where the hospital placed well in the peer screens, wage increases in excess of the guidelines were recommended by the staff and approved by the Commission. (CR 42, Ex. 11, p. 7; McCarthy dep.). Furthermore, Commissioners gave other examples of sufficient justification for deviation from the guidelines, such as increased productivity. (CR 42, Ex. 12, p. 9; Ex. 15, p. 3; McCarthy dep.).

Commissioners also noted publicly that they were not trying to focus only on wages and salaries. They were looking at increases in *all* costs. The guidelines for fiscal year 1984, for example, included detailed analyses of several factors in addition to wages and salaries, including professional fees, purchased services, supplies, food, utilities, interest, and capital. (CR 41, Ex. 5; Click dep.). Nevertheless, since wages and salaries comprise such a significant portion of operating expenses—between 55 and 60%—they warranted an especially close examination. (CR 42, Ex. 12, p. 3; Ex. 15, p. 2; McCarthy dep. *Cf.* Exc. Vol. II, p. 56 Click dep.).

The Commissioners' Hands-Off Approach Toward Wage Negotiations

To suggest that "the Commission used its budget procedures and its influence to coerce negotiators to settle labor contracts within the state guidelines" (Petition, p. 6), is simply incorrect. Quite to the contrary, the Commission deliberately refrained from becoming involved in wage negotiations. Although the Commission was asked by hospital representatives to take the initiative and become involved, by communicating directly to the Nurses Association its new policy of no longer allowing automatic pass through of wage increases, the Commission refused to do so. (CR 42, Ex. 12, p. 8; Ex. 15, p. 3; McCarthy dep.).

The Commission did not, on the other hand, in any way try to hide this new policy from the public. It was thoroughly discussed at meetings of the Commission, which were open to the public. And the Commission chair-

man did meet with representatives of the Nurses Association to discuss the Commission's role. (CR 42., Ex. 15, p. 3; McCarthy dep.).

More specifically:

> "On January 24, 1983, the Chairman and Executive Director met with representatives of the Washington State Nurses Association at their request. The WSNA indicated a concern about the Commission's emphasis on salary and wage increases and asked if the Commission intended to become parties to their negotiations. The Chairman stated that the Commission definitely did not intend to become parties to labor negotiations."

(Exc. Vol. II, p. 8, Click affid.).

C. History of These Proceedings

On August 17, 1983 the Washington State Nurses Association (hereinafter "petitioner" or "Association"), filed this action for declaratory and injunctive relief in the United States District Court, Western District of Washington. The case was tried before Judge Jack E. Tanner on a factual record stipulated by the parties. The record included a number of stipulated facts, affidavits, depositions, and deposition exhibits. (Exc., Vol. I., p. 25; Stip. & Order). No testimony was heard.

On July 27, 1984 the district court entered findings and conclusions to the effect that certain practices of the Commission conflicted with either the National Labor Relations Act, Title 29 U.S.C. § 157, and state law as found in chapter 41.56 Wash. Rev. Code. (Exc., Vol. I., p. 32; Conclusions of Law 3 & 4, Pet. D-7, D-8). The court entered a judgment ordering the Commission to cease and desist from any involvement in the collective bargaining process between the Association and regulated hospitals. (Exc., Vol. I., p. 28; Judgment, Pet. D-9).

The case was appealed to the United States Court of Appeals for the Ninth Circuit. The matter was argued and submitted May 9, 1985 before a panel in Seattle, Washington. On October 8, 1985 the court of appeals reversed the judgment of the district court.

THE COURT OF APPEALS' RESOLUTION OF THE PREEMPTION ISSUE IS CORRECT, IS NOT IN CONFLICT WITH ANY DECISIONS OF THIS COURT OR OTHER COURTS OF APPEAL, AND PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW WHICH NEED BE SETTLED BY THIS COURT.

We have described the statutory functions and actual operations of the Commission in some detail in order to clear away the factual misstatements and mischaracterizations contained in the Petitioner's Statement of the Case, and to put the Petitioner's arguments in their proper perspective.

The Petitioner argues that the Court of Appeals impermissibly substituted its own view of the facts for that of the District Court, and thereby violated FRCP 52 as construed in *Anderson v. Bessemer City,* 470 U.S. ___, 105 S.Ct. 1504 (1985). The problem with this argument, however, is that it is virtually impossible to determine with any precision what the District Court's own view of the facts actually was; for the Findings of Fact are full of vague suggestions rather than hard facts, much like the Petitioner's Statement of the Case.

To illustrate the problem, consider first Conclusion of Law No. 3, which states:

> "The practices of the Commission, as set forth in the Findings of Fact * * * conflict with that Act [the NLRA] and are illegal. * * * Congress has not elsewhere authorized states to influence and affect collective bargaining as the Commission has done here. For these reasons, the Commission's actions are pre-empted by Federal labor law." (Pet. D-7, D-8)

Also relevant here is the injunctive order, which states:

> "* * * Defendants shall forthwith cease and desist from any involvement in the collective bargaining process between the Washington State Nurses Association and those hospitals which are regulated by Defendants." (Pet. D-9)

Presumably this order encompasses any and all of the "practices" and "actions" previously declared illegal in

Conclusion of Law No. 3. And those practices, in turn, are the ones described in the Findings of Fact. (See Pet. D-1 through D-7). But when one turns to those Findings of Fact, it is impossible to find clear answers to questions such as the following:

(1) Is the Commission prohibited from engaging in any rate setting at all if—as is certainly the case—any such rate setting is likely to have an impact on the collective bargaining process?

(2) If the answer to the first question is "No", is the Commission nevertheless prohibited from making any judgment, in its operation of the rate-setting process, as to the reasonableness of various possible wage increases? Stated otherwise, is the Commission prohibited from doing anything other than automatically passing through into the rate structure any and all wage increases, however large they might be?

(3) If the answer to the second question is "No", are the members of the Commission nevertheless prohibited from discussing the Commission's policy and procedures regarding wage settlements at its public meetings?

In short, what precisely are the Commission actions which impermissibly "* * * 'interfere[d] with' and/or 'influence[d]' the outcome of collective bargaining," and which the Commission may no longer continue under the district court's ruling? (*Cf.* Finding of Fact No. 8, Pet. D-6).[2] Even the most careful reading of the Findings of Fact does not tell us.

There is a related problem, raised by Petitioner's reliance upon *Bessemer, supra.* Finding of Fact No. 8, combined with the statement in Conclusion of Law No. 3 that "[t]he Commission is not acting in a 'neutral' fashion as it seeks to adjust the interests of employers, unions, and employees in the collective bargaining area," seems to suggest that the Commission's decisions were motivated by some

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[2]As the Court of Appeals noted, "* * * the [district] court's findings did not identify specific practices to which it was referring." (Pet. A-4). Similarly, in the Petitioner's Statement of the Case, we find a similar vagueness and lack of record references. This makes the task of answering the Petition all the more difficult.

sort of bias or animus against employees and their unions, similar to the sexual bias involved in *Bessemer*. (See Petition pp. 4, 5).

But again, the suggestion is merely that, and not a clear ultimate finding of discriminatory intent similar to the finding in *Bessemer*. Further, even if the District Court's language in Conclusion of Law No. 3 is construed to constitute such a finding, it is not at all clear which actions of the Commission form the factual basis for that finding. The basis may simply be the Commission's decision to change its prior policy of allowing an automatic pass-through of any and all wage increases; or it may be something more. It is impossible to tell.

We turn, then, to what the Court of Appeals viewed — quite correctly, we believe — as the central issue in this case, viz., the "* * * Commission's use of the 'guidelines' to measure the reasonableness of wage increases as a component of the overall costs which the Commission permits to be reflected in the rates." (Pet. A-4). And on that issue, we need add little to the analysis of the Court of Appeals. (Pet. App. A).

Any system of rate setting, be it for hospitals, public utilities, or any other regulated business, inevitably produces a "tension", to use the term of the Court of Appeals, with the interest of that business's employees in bargaining for higher wages. (See Pet. A-1).

The Petitioner's major claim seems to be that the NLRA requires a rate-setting agency, such as the Hospital Commission, to eliminate that tension by allowing an automatic pass through of any and all wage increases. The challenge is thus directed to the use of *any* guidelines for wages and salaries, not just the particular guidelines adopted by the Commission in 1982.

This challenge, if successful, would require, of course, a jettisoning of any effective effort to control hospital rates.

Other than the District Court, which upheld the Petitioner's claim in this case, no court has gone to this extreme.

For example, in *Massachusetts Nursing Association*

v. Dukakis, 726 F.2d 41 (1st Cir. 1984), the Nursing Association challenged, on the grounds of preemption by the NLRA, a Massachusetts rate-setting system virtually identical to the Washington system challenged herein.[3] Both systems evaluated various categories of costs, including wage costs, and determined the extent to which those costs would or would not be allowed to be passed through into the rate structure.

In rejecting the preemption challenge, the Court of Appeals in *Dukakis* relied upon *Amalgamated Transit Union, Division 819 v. Byrne*, 568 F.2d 1025 (3d Cir. 1977) (*en banc*), in which the Third Circuit held that a state governor had not violated federal labor policy when he threatened to cut off state subsidies to any transit company that agreed with a union to include an open-ended cost of living increase provision in a labor agreement. The court below in the instant case relied squarely upon *Dukakis* and *Byrne*. (Pet. A-9, A-13).

Neither the Massachusetts Rate-Setting Commission involved in *Dukakis* nor the Washington State Hospital Commission, it should be emphasized, attempt to act as a kind of state counterpart to the now defunct federal Cost of Living Council. (See Economic Stabilization Act of 1970, P.L. 91-379, 84 Stat. 799). That is, the Commissions do not, and indeed cannot, approve or disapprove wage settlements or any other elements of a hospital's costs. The Commissions approve or disapprove only two things; the hospital's total revenue, and its schedule of rates for its patients.

The states, in short, control only the size of the pie; the employees are free to bargain for as large a slice as they wish.[4]

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[3]For a description of the Massachusetts system, see *Dukakis*, 726 F.2d at 45, 46.

[4]To deny the states this power to set rates, and to thereby control the total size of the pie, on the grounds that such power is preempted by the NLRA, would have troublesome implications. As stated by Judge Coffin in *Dukakis:*

> Finally, aside from precedent, deference, and the intent to be derived from federal legislative evolution, we sample the implications

The Petitioner asserts that the decision below — and presumably the decisions in *Dukakis* and *Byrne* as well — are in conflict with *General Electric Company v. Callahan*, 294 F.2d 60 (1st Cir. 1961), cert. dism. 369 U.S. 832 (1962) and *Oil, Chemical and Atomic Workers v. Arkansas Louisiana Gas Company*, 332 F.2d 64 (10th Cir. 1964).

In both of these cases, a state agency was authorized to engage in fact finding and the making of recommendations in order to establish the blame or responsibility in a labor dispute, and thus to coerce settlement of the dispute through the force of public opinion. The Courts of Appeal in both cases found this state intrusion into the collective bargaining process to be in violation of the federal labor policy embodied in the NLRA. No such state intrusion exists here. Hospitals and their employees are free to bargain just as they like, free of any state coercion or sanctions.

Petitioner also suggests that the issue involved in this case may be related to those which will be examined by this Court in *Golden State Transit Corp. v. City of Los Angeles*, 754 F.2d 830 (9th Cir. 1985), cert. granted June 17, 1985, and *Wisconsin Dept. of Industry v. Gould, Inc.*, 750 F.2d 608 (7th Cir. 1984), prob. juris. noted May 20, 1985.

Those cases, to be sure, present preemption claims under the NLRA; but that is the end of any similarity with this case. In *Golden State Transit*, the issue is whether a

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of appellant's reasoning. First of all, in any industry the price of whose product or service — such as electric power, telephone, natural gas, or even rent controlled real estate — is regulated, a state would find its regulatory system vulnerable to preemptive attack on the ground that the overall control of price was too inhibiting an influence on collective bargaining. Logic, however, would carry beyond simple price control. Any state or municipal program that substantially increased the costs of operation of a business in a competitive market would be similarly vulnerable to the preemption argument. Clean air and water laws, selective cutting requirements in forest operations, industrial safety standards, tax increases — all pro tanto hobble collective bargaining in that they constitute part of the universe in which collective bargaining takes place, just as do general prosperity or depression. But they do not add to or detract from the rights, practices, and procedures that together constitute our collective bargaining system. 726 F.2d at 45.

city's decision not to renew a taxi franchise because of a labor dispute between the franchisee and its employees constitutes an impermissible immersion in the collective bargaining process. An in *Gould*, the issue is whether a state may impose, for violations of the NLRA by an employer, its own additional sanctions upon that employer, by refusing to do business with him.

No such issues are presented here.

Finally, it should be noted that the guidelines at issue in this case are no longer in effect, having been superseded by formal rules adopted by the Commission on October 31, 1985. The rules provide a different method of projecting labor costs. The guidelines at issue here are thus no longer being used by the Commission. *See* Washington Administrative Code 261-40-150(5)(c)(ii).

CONCLUSION

For the reasons given above, the Petition for Certiorari should be denied.

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APPENDIX

(All statutory provisions are as in effect in 1983.)

RCW § 70.39.010 Purpose. The primary purpose of this chapter is to promote the economic delivery of high quality and effective hospital health care services to the people by establishing a hospital commission with authority over financial disclosure and budget and prospective rate review and other related matters, which will assure all purchasers of hospital health care services that total hospital costs are reasonably related to total services, that hospital rates are reasonably related to aggregate costs, and that such rates are set equitably among all purchasers of these services without undue discrimination.

The legislature finds and declares that rising hospital costs are a vital concern to the people of this state because of the danger which is posed that hospital and health care services are fast becoming out of the economic reach of the majority of our populations. It is further declared that health care is a right of the people and one of the primary purposes for which governments are established, and it is, therefore, essential that an effective cost control program be established which will both enable and motivate hospitals to control their spiraling costs. It is the legislative intent, in pursuance of this declared public policy, to provide for uniform measures on a state-wide basis to control hospital costs without the sacrifice of quality of service. [Wash. Rev. Code § 70.39.020.]

§ 70.30.030 Hospital commission—Created—Membership. There is hereby created a hospital commission, which shall be a separate and independent commission of the state. The commission shall be composed of five members appointed by the governor, and generally representative of the public as consumers, labor, business, and hospitals, and shall be individuals concerned with the delivery of quality health care; but in no event shall more than two members have any fiduciary obligation to a health facility or other health agency, nor any direct financial interest in the rendering of health services. In cases when proposed rate increases for osteopathic hos-

pitals are to be considered, the representative of osteopathic hospitals on the technical advisory committee shall replace a hospital representative on the commission. [Wash. Rev. Code § 70.39.030.]

§ 70.30.100 Uniform system of hospital accounting and reporting. (1) The commission, after study and in consultation with advisory committees, if any, shall establish by the promulgation of rules and regulations pursuant to the Administrative Procedure Act, chapter 34.04 RCW, a uniform system of accounting and financial reporting, including such cost allocation methods as it may prescribe, by which hospitals shall record their revenues, expenses, other income, other outlays, assets and liabilities, and units of service. All hospitals shall adopt the system for their fiscal year period to be effective at such time and date as the commission shall direct. * * * [Wash. Rev. Code § 70. 39.100.]

§ 70.39.110 Annual reports by hospitals. (1) Each hospital shall file annually with the commission after the close of the fiscal year:

(a) A balance sheet detailing the assets, liabilities, and net worth of the hospital;

(b) A statement of income and expenses;

(c) Such other reports of the costs incurred in rendering services as the commission may prescribe.

(2) Where more than one licensed hospital is operated by the reporting organization, the information required by this section shall be reported for each hospital separately.

(3) The commission shall require certification of specified financial reports by the hospital's certified public accountant, and may require attestation as to such statements from responsible officials of the hospital that such reports have to the best of their knowledge and belief been prepared in accordance with the prescribed system of accounting and reporting.

(4) All reports, except privileged medical information, filed under this chapter shall be open to public inspection.

(5) The commission shall have the right of inspection of hospital books, audits, and records as reasonably necessary to verify hospital reports. [Wash. Rev. Code § 70.39.110.]

§ 70.30.140 Hospital rates—Review and investigation—Costs—Establishment of rates—Coordination with federal programs. From and after a date of less than twelve months but not more than twenty-four months after the adoption of the uniform system of accounting and financial reporting required by RCW 70.39.100, as the commission may direct, the commission shall have the power to initiate such reviews or investigations as may be necessary to assure all purchasers of hospital health care services that the total costs of a hospital are reasonably related to the total services offered by that hospital, that the hospital's aggregate revenues as expressed by rates are reasonably related to the hospital's aggregate costs; and that rates are set equitably among all purchasers or classes of purchasers of services without undue discrimination or preference.

In order to properly discharge these obligations, the commission shall have full power to review projected annual revenues and approve the reasonableness of rates proposed to generate that revenue established or requested by any hospital subject to the provisions of this chapter. No hospital shall charge for services at rates other than those established in accordance with the procedures established hereunder.

In the interest of promoting the most efficient and effective use of hospital health care service, the commission may promote and approve alternative methods of rate determination and payment of an experimental nature that may be in the public interest and consistent with the purposes of this chapter.

The commission shall serve as the state agency responsible for coordinating state actions and otherwise responding and relating to the efforts of the cost of living council, or its successor, in planning and implementing federal cost containment programs with respect to hospi-

tals and related health care institutions as authorized by the Federal Economic Stabilization Act of 1970, as now or hereafter amended, and any rules or regulations promulgated thereto. In carrying out this responsibility, the commission may serve as the state agency responsible for recommending increases in rates for hospitals and related health care institutions to the cost of living council, or its successor; may apply to the cost of living council for authorization to administer a control program in Washington state in lieu of the federal controls established and otherwise administered by the cost ofliving council; may assume another function or role authorized by appropriate federal regulations implementing the Federal Economic Stabilization Act of 1970; or assume any combination of such roles or functions as it may determine will most effectively contain the rising costs of the varying kinds of hopsitals and related health care institutions in Washington state. In determining its functions or roles in relation to the efforts to the cost of living council, or its successor, the commission shall seek to ensure coordination, and the reduction of duplicatory cost containment efforts, by the state and federal governments, as well as the diligent fulfillment of the purposes of this chapter and declared public policy and legislative intent herein: *Provided, However,* That in cases where the rates of nursing homes or similar health institutions are subject to review pursuant to the provisions of the Federal Economic Stabilization Act of 1970 or any rules or regulations promulgated thereto, the members of the commission representing hospitals shall not sit in the proceedings nor vote, and the governor shall appoint an ad hoc member representing nursing homes or similar health institutions in lieu thereof, who shall have the same powers as the other members with respect to such review only. [Wash. Rev. Code § 70.39.140.]

§ 70.39.150 Powers and duties of commission. To properly carry out its authority the commission shall:

(1) Compile all relevant financial and accounting data in order to have available the statistical information

necessary to properly conduct rate review and approval. Such data shall include necessary operating expenses, appropriate expenses incurred for rendering services to patients who cannot or do not pay, all, properly incurred interest charges, and reasonable depreciation expenses based on the expected useful life of the property and equipment involved. The commission shall define and prescribe by rule and regulation the types and classes of charges which cannot be changed except as provided by the procedure contained in RCW 70.39.160 and it shall also obtain from each such hospital a current rate schedule as well as any subsequent amendments or modifications of that schedule as it may require.

(2) Permit any nonprofit hospital subject to the provisions of this chapter to charge reasonable rates which will permit the hospital to render effective and efficient service in the public interest and on a solvent basis.

(3) Permit any proprietary profit-making hospital subject to the provisions of this chapter to charge reasonable rates which will permit the hospital to render effective and efficient service in the public interest and which includes an allowance for the fair return to stockholders based upon actual investment or, if the hospital elects, upon the fair value of the investment on the effective date of this section: *Provided,* That once the election is made it may not be changed without the approval of the commission.

(4) Take into account, in the determination of reasonable rates under this section for each hospital, the recommendations of appropriate area-wide and state comprehensive health planning agencies to ensure compliance with Washington comprehensive health planning law, chapter 70.38 RCW.

(5) Permit, in considering a request for change in or initiating a review of rate schedules or other charges, any hospital subject to the provisions of this chapter to charge rates which will in the aggregate produce sufficient total revenue for the hospital to meet all of the reasonable obligations specified in this chapter. [Wash. Rev. Code § 70.39.150.]

§ 70.39.160 Changes in rates—Procedure. From and after the date determined by the commission pursuant to RCW 70.39.140, no hospital subject to the provisions of this chapter shall change or amend that schedule of rates and charges of the type and class which cannot be changed without prior approval of the commission, except in accordance with the following procedure:

(1) Any request for a change in rate schedules or other charges must be filed in writing in the form and content prescribed by the commission and with such supporting data as the hospital seeking the change deems appropriate. Unless the commission orders otherwise provided for in subsection (4) of this section, no hospital shall establish such changes except after notice to the commission of at least thirty days from the time the rate is intended to go into effect. Upon receipt of notice, the commission may suspend the effective date of any proposed change. In any such case a formal written statement of the reasons for the suspension will be promptly submitted to the hospital. Unless suspended, any proposed change shall go into effect upon the date specified in the application.

(2) In any case where such action is deemed necessary, the commission shall promptly, but in any event within thirty days, institute proceedings as to the reasonableness of the proposed changes. The suspension may extend for a period of not more than thirty days beyond the date the change would otherwise go into effect: *Provided,* That should it be necessary, the commission may extend the suspension for an additional thirty days. After the expiration of ninety days from the date the rate is intended to go into effect the new rate will go into effect, if the commission does not approve, disapprove, or modify the request by that time.

(3) Such proposed changes shall be considered at a public hearing, the time and place of which shall be determined by the commission. The hearing shall be conducted by the commission. Evidence for and against the requested change may be introduced at the time of the hearing by any interested party and witnesses may be heard. The

hearing may be conducted without compliance with formal rules of evidence.

(4) The commission may, in its discretion, permit any hospital to make a temporary change in rates which shall be effective immediately upon filing and in advance of any review procedure when it deems it in the public interest to do so. Notwithstanding such temporary change in rates, the review procedures set out in this section shall be conducted by the commission as soon thereafter as is practicable.

(5) Every decision and order of the commission in any contested proceeding shall be in writing and shall state the grounds for the commission's conclusions. The effects of such orders shall be prospective in nature. [Wash. Rev. Code § 70.39.160.]

§ 70.39.200 Penalties for violations. Every person who shall violate or knowingly aid and abet the violation of this chapter or any valid orders, rules, or regulations thereunder, or who fails to perform any act which it is herein made his duty to perform shall be guilty of a misdemeanor. Following official notice to the accused by the commission of the existence of an alleged violation, each day upon which a violation occurs shall constitute a separate violation. Any person violating the provisions of this chapter may be enjoined from continuing such violation. [Wash. Rev. Code § 70.39.200.]